In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1367

CHARLES QUINN BLACKWELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The instant petition presents the single question whether petitioner's appearance under subpoena before the grand jury which subsequently returned two indictments against him requires reversal of the convictions obtained pursuant to those indictments. The charges were tried by jury in separate trials in the United States District Court for the Middle District of Georgia. The court below consolidated the two appeals and affirmed both convictions (Pet. App. A).

In No. 25,522 petitioner (who was tried with a co-defendant, Young, who was also convicted but died pending appeal) was convicted on five counts of an indictment charging him, in one count, with conspiracy to commit mail fraud and to travel in interstate commerce to commit the unlawful activity of arson and, in the remaining counts, with substantive violations of the federal statutes punishing those activities (18 U.S.C. 1341, 1952). He was sentenced to concurrent five year terms of imprisonment. The evidence (the sufficiency of which is not in issue) showed that petitioner, an insurance claim adjuster, took part in a scheme to have two houses burned in order to collect the proceeds from insurance on them. In each case petitioner adjusted the fire loss. The houses were burned by two arsonists, who traveled in interstate commerce to carry out the plan.

In No. 25,523 petitioner was convicted on a one count indictment charging him and others with unlawful use of the mails to defraud an insurance company, in violation of 18 U.S.C. 1341. He was sentenced to two and one half years' imprisonment, to run concurrently with the sentences imposed in No. 25,522. The evidence showed that petitioner participated, as the insurance claim adjuster, in a scheme to collect automobile collision insurance proceeds for damages claimed for a fictitious car crash.

Petitioner appeared under subpoena before the federal grand jury which subsequently returned the instant indictments. At the time of this appearance (July 25, 1967), the grand jury was investigating the activities of one Bridges, who played a prominent role

in the arson-insurance scheme, and Hall, one of the arsonists. Prior to testifying, petitioner was warned by the prosecutor that he did not have to say anything which might tend to incriminate him but that anything he did say could be used against him. Petitioner stated that he understood the warnings. At no time did he invoke the privilege against self-incrimination (see 3 R. 42).[1] Affidavits subscribed by the United States Attorney and the F.B.I. agent in charge of the investigation in these cases indicated that the government regarded petitioner as a witness rather than a potential defendant at the time (3 R. 39-49).

In both cases, petitioner made pre-trial motions to suppress evidence and to dismiss the indictment because of this appearance. The trial judge held a lengthy hearing on the motions (3 R. 88-125). In the course of the hearing, petitioner's counsel asked the trial judge to inspect the grand jury testimony *in camera*, in order to protect petitioner from any prejudice that might result from the use of that testimony at trial (3 R. 115). The court ruled that it would not admit any evidence obtained against petitioner as a result of his grand jury appearance. With the consent of the prosecutor, it adopted the procedure defense counsel suggested, and inspected the grand jury's minutes *in camera* (3 R. 121-123). No evidence relating to those proceedings was introduced by the government at either trial. (See R. 680).[2]

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[1] "3 R." refers to the record of proceedings in No. 25,523, a copy of which is on file with the Clerk of this Court.

[2] "R." refers to the record of proceedings in No. 25,522, a copy of which is on file with the Clerk of this Court.

The court of appeals properly held that petitioner was not entitled to reversal simply because the grand jury had subpoenaed him to testify. According to the uncontroverted affidavits of the government prosecutor and agent-in-charge of the investigation, petitioner was not regarded as a potential defendant at the time of his grand jury appearance. The federal courts of appeals have uniformly held that even a potential defendant properly advised of his rights, as in this case, may be subpoenaed as a competent witness before a grand jury. See, *e.g.*, *United States* v. *Fortunato*, 402 F. 2d 79, 82 (C.A. 2), certiorari denied, March 24, 1969 (No. 1273 Misc. this Term); *United States* v. *Capaldo*, 402 F. 2d 821, 823-824 (C.A. 2), certiorari denied, April 21, 1969 (No. 1352 Misc. this Term); *Jones* v. *United States*, 342 F. 2d 863, 880-882 (C.A. D.C.) (en banc).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1969

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CERTIORARI DENIED